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00-1136

~~No. 00-1117~~

Supreme Court, U.S.
FILED
MAR 5 2001
OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, *et al.*,
Petitioners,

v.

MISSOURI REPUBLICAN PARTY, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. Respondents make the same attack here that their counsel took in opposing the State of Missouri's petition for writ of certiorari in *Nixon v. Shrink Missouri Government PAC*, 120. S.Ct. 897 (2000): to allege an absence of proof and suggest that the real issue is one of the adequacy of the factual record, rather than an issue of law. That attack ignores what happened below. Petitioners "moved for summary judgment, contending that the contribution limits at issue here . . . do not violate the First Amendment *as a matter of law*." Petition Appendix (Pet. App.) A-22 (emphasis added). The district court agreed,

holding that because political party committees are indistinguishable, in a constitutional sense, from ideologically-based committees, the state can rely on the holding in *Shrink Missouri*. Pet. App. A-29-38. Thus the district court never reached the point at which the state had to prove "that the support provided by political party committees" specifically, as opposed to the support provided by political committees generally, "causes corruption or even the perception of corruption." Brief in Opposition (Br. Opp.) at 13. And the court of appeals' decision leaves no room for such inquiry.

In a backhanded way, respondents suggest a rationale for the court of appeals' decision not to remand for factual development under the "correct" law. Br. Opp. at 20. They cite *Fabric v. Provident Life & Acc. Ins. Co.*, 115 F.3d 908 (11th Cir. 1997), *cert. denied* 523 U.S. 1095 (1995), for a "well-settled" rule permitting such judgments against nonmoving parties. But that claim ignores a basic premise made clear by this Court in *Fountain v. Filson*, 336 U.S. 681 (1949), on which the Eleventh Circuit relied. An appellate court cannot enter judgment against the moving party where "[t]here was no occasion in the trial court for [the moving party] to dispute facts material to" the non-moving party's claim. *Id.* at 683. Again, the argument presented in petitioners' motion for summary judgment was that this case is no different from *Shrink Missouri*. Neither the applicable rules (*see* Fed. R. Civ. P. 56; E.D. Mo. Local Rule 7-4.01(C)) nor logic suggests that respondents could, merely by claiming in opposition to petitioners' motion for summary judgment "that factual disputes regarding the nature of the party's financial support of its candidates preclude summary judgment" (Pet. App. A-22), impose on petitioners an obligation to prove in their reply a case based on a legal theory they opposed. Thus even a correct finding that the record at this stage is "wholly devoid of any evidence" (Pet. App. A7, quoted, Br. Opp. at 2, 22) would justify at most a remand, for

petitioners were entitled to an "opportunity to remedy the defect which the appellate court discovered in this case" (*Fountain*, 366 U.S. at 683).

But again, the court of appeals did not really leave room for factual inquiry. It accepted respondents' proposition that "there is no direct analogy between individual campaign contributions and a political party's contributions to candidates" (Br. Opp. at 22) as a matter of law. It denied the district court the opportunity to receive and consider in the first instance proof regarding political party committees and corruption as another district court once did in *Buckley v. Valeo*, 424 U.S. 1 (1976). In effect, the court of appeals declared that the State can never, as a matter of law, succeed on remand. That dramatic declaration merits this Court's review.

2. Respondents quote the court of appeals' characterization of petitioners' claim as merely a "threat that a political party will corrupt a candidate." Br. Opp. at 13. But that is a crabbed view. Petitioners have always said that large sums flowing to a committee and then on to a candidate carry the appearance of corruption because of their source and destination, not because of the identity of the intermediary. But again, the court of appeals did not wait for proof; instead it held that as a matter of constitutional law, the perception created by the flow of money through party committees is so different from the perception created by the flow of money though the Shrink Missouri Government PAC that the former merits treatment entirely different from that given to the latter in *Shrink Missouri* and *Buckley*. The Eighth Circuit then left the question of what proof is acceptable as unclear as it did when it decided *Shrink Missouri* and its predecessors. If the Eighth Circuit was right in differentiating this case from *Buckley* and *Shrink Missouri*, the states – and the federal government – need some guidance on meeting that evidentiary challenge. Such

guidance will not come in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, No. 00-191 (*Colorado Republican II*), unless the Court there entirely eliminates, for party committees, the line between contributions and expenditures, as respondents urge (*see* Br. Opp. at 18).

3. Respondents' reiteration of the suggestion that party contribution limits are unnecessary because other tools are available to attack evasion actually reinforces the link between this case and the sections of the Federal Election Campaign Act (FECA) upheld in *Buckley*. Federal law, too, prohibits agreements to pass funds through committees. *See* 2 U.S.C. § 441a(a)(8). But in *Buckley*, that was insufficient to defeat the antievasion rationale. *See* 424 U.S. at 38. And it was insufficient in *California Medical Association v. Federal Election Comm'n*, where this Court rejected the notion that the presence of anti-fraud provisions in the FECA rendered the antievasion rationale unavailable to uphold a cap on contributions to candidates by multicandidate committees. 453 U.S. 182, 200, n. 20 (plurality), 204 (Blackmun, J., concurring) (1981). That reasoning remains appropriate today – particularly where, as here, there is no showing that the alternative mechanism can reach any but the most egregious cases.

Moreover, to parse through a statute and assume (without proof) that one part of a complex regulatory scheme renders another part unnecessary and thus unconstitutional conflicts with this Court's insistence that courts not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982), *citing California Medical*, 453 U.S. at 201 (plurality).

4. Unable to deny that the court of appeals' decision contradicts those of other courts, respondents belittle the

significance of the contrary holdings. Two of their references merit note.

Respondents reiterate that the Colorado legislature enacted a new regulatory scheme, without limits on party contributions (*see* Colo. Stat. chp. 1-45 (2000)), after significant portions of its previous scheme were struck down (*see Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1087 (D. Colo. 1999), *vacated sub nom. Citizens for Responsible Government v. Davidson*, 2000 U.S. App. LEXIS 33727 (10th Cir. 2000)). But that change merely proves the need to allow legislatures, not courts, to "fine tune" (*Buckley*, 424 U.S. at 20) campaign finance regulations. Today, the Colorado legislature can further "fine tune" its regulatory scheme by reinstating party limits. Legislatures in Missouri and other Eighth Circuit states cannot.

Respondents' pointed reference (Br. Opp. at 14) to the size of the Alaska limits is misleading. Missouri imposes limits "per election"; Alaska poses them "per year." *See* Alaska Stat. § 15.13.070(d). A "year" covers not just the primary and general elections, but even months before candidate filing, thus covering the entire period during which party contributions are likely. *See id.* §§ 15.25.040, 15.15.020.[1] And Alaska aggregates in one limit what Missouri limits separately as monetary and "in-kind" contributions. *See id.* § 15.12.400(3). The limits in the two states are really comparable – yet now, while Missouri parties can give unlimited amounts, Alaska parties cannot.

[1] The same is true of Vermont's "too low" limits, which apply to contributions made during a two-year "election cycle." Vt. Stat. Ann. tit. 17 § 1805(a).

But with regard to Alaska, perhaps most important is respondents' accusation that the court's analysis was "cursory." Br. Opp. at 14. The Alaska court could give "cursory" consideration to the factual basis for party limits because it concluded that a political party committee handing money to candidates is no different, as a matter of law, from political committees whose contributions are limited under *Buckley*. This Court's later decision in *Shrink Missouri* reinforces, rather than casts doubt upon, that conclusion. And again, that conclusion directly conflicts with the one reached by the Eighth Circuit.

5. Respondents deny any need for the Court to consider this case after *Colorado Republican II* because, they say, "[t]here is no difference . . . between 'cash' contributions made by a political party and cash 'expenditures' made by a political party in cooperation with its candidates." Br. Opp. 18. That statement highlights the independent significance of this case. *Colorado Republican II* merely addresses a point on the spectrum between pure contributions and pure expenditures. It requires the Court to consider whether that point is on the expenditure or on the contribution side of the line identified in *Buckley*. Respondents place all political party spending in support of candidates on the expenditure side of the line. That is what the court of appeals did, albeit under the guise of an evidence-based ruling, using a twisted version of the *Shrink Missouri* holding that conflicts with every other court to address the question. This Court should grant the petition and consider whether the allegedly unique nature of political party committees merits such a dramatic change in campaign finance jurisprudence.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition and consider the Eighth Circuit's sweeping holding.

Respectfully submitted,

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March 2, 2001